

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MICHAEL A. PAUL,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:14-cv-00460-MMD-WGC

ORDER

The Court directed petitioner to show cause why this action should not be dismissed as untimely. Order (dkt. no. 5). Petitioner has filed a motion showing cause (dkt. no. 18), and respondents have filed a response (dkt. no. 27). Petitioner does not persuade the Court, and the Court will dismiss this action.

Petitioner does not dispute the dates in Court's calculations. Instead, he argues that the Court should use the dates of other court decisions or that equitable tolling is warranted.

Petitioner's arguments that this Court should allow him to pursue a successive petition for a writ of habeas corpus under 28 U.S.C. § 2244(b) are moot. To the best of this Court's knowledge, petitioner has never filed another habeas corpus petition in this Court challenging his custody under this judgment of conviction. This petition is not successive, but it is untimely.<sup>1</sup>

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<sup>1</sup>Petitioner's second state habeas corpus petition was dismissed under state law as successive and untimely, but that has no effect on whether a federal habeas corpus petition is successive.

1           Petitioner's arguments based upon *Byford v. State*, 994 P.2d 700, 713-14 (Nev.  
2   2000), and its state and federal progeny, are inapposite. *Byford* held that a jury  
3   instruction blurred the elements of willfulness, deliberation, and premeditation, all  
4   necessary for a finding of first-degree murder. However, petitioner pleaded guilty to first-  
5   degree murder, and thus the state district court did not give the erroneous jury  
6   instruction.

7           Petitioner's reliance upon *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Dickens*  
8   *v. Ryan*, 740 F.3d 1302 (9th Cir. 2014), is inapposite. *Martinez* allowed for a person to  
9   excuse a procedurally defaulted ground of ineffective assistance of trial counsel upon a  
10   showing of ineffective assistance of post-conviction counsel.<sup>2</sup> However, procedural  
11   default by operation of state law is not the issue in this case. The issue is the  
12   untimeliness of this action under federal law, and *Martinez* provides no exception to the  
13   operation of the federal statute of limitations. This action was untimely long before  
14   petitioner filed his untimely state habeas corpus petition or the dates of the decisions in  
15   *Martinez* and *Dickens*.

16           Petitioner does not persuade the Court with his argument that he is actually  
17   innocent. "[A] petitioner does not meet the threshold requirement unless he persuades  
18   the district court that, in light of the new evidence, no juror, acting reasonably, would  
19   have voted to find him guilty beyond a reasonable doubt." *McQuiggin v. Perkins*, 133 S.  
20   Ct. 1924, 1928 (2013) (quoting *Schlup v. Delo*, 515 U.S. 298, 329 (1995)). "[A]ctual  
21   innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United*  
22   *States*, 523 U.S. 614, 623 (1998). Respondents note that the court of appeals has not  
23   yet decided whether the actual-innocence gateway exists for a case involving a guilty  
24   plea. The Court need not decide whether the actual-innocence gateway does apply,  
25   because even if it does, petitioner clearly is not actually innocent.

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27           <sup>2</sup>The court of appeals has extended this principle to procedurally defaulted  
28   grounds of ineffective assistance of appellate counsel. *Ha Van Nguyen v. Curry*, 736  
F.3d 1287 (9th Cir. 2013).

1           Petitioner argues that he was mentally ill, an alcoholic, and voluntarily intoxicated  
2 at the time that he killed a man named Newton. Petitioner's own description of the  
3 events leading up to his killing of Newton show that he was aware of what he did.  
4 Motion, at 6-7 (dkt. no. 18). If petitioner was mentally ill, it did not prevent him from  
5 forming the intent to kill. Voluntary intoxication is a factor for the jury to consider when  
6 the intent to commit a crime is an element of the crime itself.

7           No act committed by a person while in a state of voluntary intoxication  
8 shall be deemed less criminal by reason of his or her condition, but  
9 whenever the actual existence of any particular purpose, motive or intent  
10 is a necessary element to constitute a particular species or degree of  
crime, the fact of the person's intoxication may be taken into consideration  
in determining the purpose, motive or intent.

11 Nev. Rev. Stat. § 193.220.

12           First, if the statement in *Bousley* that "'actual innocence' means factual  
13 innocence" applies to the physical acts committed and not the mental state, then  
14 petitioner cannot be actually innocent. Petitioner killed Newton. He admitted it in his  
15 guilty-plea colloquy, he admitted it in cross-examination in the evidentiary hearing in his  
16 first state habeas corpus petition, and he admits it at pages 6-7 of his motion showing  
17 cause (dkt. no. 18). At most, if petitioner had persuaded a jury that he was so  
18 intoxicated that he could not form an intent to kill Newton, he would not have been  
19 found guilty of first-degree murder, but he would have been found guilty of second-  
20 degree murder. Second-degree murder is a crime of general intent, and it does not  
21 require a specific intent to kill. See *Hancock v. State*, 397 P.2d 181, 182 (Nev. 1964).  
22 No rational juror would have acquitted petitioner of killing Newton, and thus petitioner is  
23 not actually innocent.

24           Second, if it is possible to be actually innocent of first-degree murder while still  
25 being guilty of second-degree murder, petitioner still has not reached the high threshold  
26 for actual innocence. As the statute notes, voluntary intoxication is another factor that a  
27 jury can consider in determining whether petitioner had the intent to kill, but voluntary  
28 intoxication by itself does not automatically immunize petitioner from being guilty of first-

1 degree murder. Even with the limited part of the record before the Court, there was  
2 plenty of other evidence for a jury to consider. Petitioner admits that he was furious with  
3 Newton. Newton was living with petitioner, wore out his welcome, and in revenge called  
4 child protective services with a complaint about petitioner. Petitioner had to leave his  
5 own home so that the children could be returned to his wife. Newton again went to live  
6 with petitioner, and he bragged to others about how he got petitioner into trouble.  
7 Petitioner and another friend drove with Newton to Spanish Springs, a rural or semi-  
8 rural area northeast of Reno, where petitioner attacked Newton. Motion, at 6-7 (dkt. no.  
9 18). When petitioner killed Newton, he hit Newton in the head with a rock at least twice.  
10 Then petitioner set down or dropped the rock, picked up a knife, and cut or stabbed  
11 Newton's throat. *Id.* at 58-59 (#18).<sup>3</sup> The friend put Newton's body into a shallow grave,  
12 and then petitioner and the friend left.

13 That is not evidence of a person who is so intoxicated that he could not form an  
14 intent to kill. It is difficult to believe that petitioner was so intoxicated that he had no  
15 intent to kill Newton but still was able to strike repeated, deadly blows Newton, to  
16 change weapons, and to strike even more deadly blows. A jury might not have believed  
17 that petitioner was intoxicated. A jury might have believed that petitioner was intoxicated  
18 but that he intended to kill Newton. The Court cannot conclude that, with that evidence,  
19 no rational juror could find petitioner guilty of first-degree murder beyond a reasonable  
20 doubt.

21 The Court denies petitioner's other motions because the Court is dismissing this  
22 action.

23 Reasonable jurists would not find the Court's conclusions to be debatable or  
24 wrong, and the Court will not issue a certificate of appealability.

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27 <sup>3</sup>The Court is using the page numbers generated by the electronic docketing  
28 system in this citation. The cited document is the transcript of the evidentiary hearing in  
petitioner's first state habeas corpus petition. Petitioner is admitting on cross-  
examination the statements that he gave in his guilty-plea colloquy.

1 It is therefore ordered that petitioner's motion to proceed on unopposed petition  
2 for writ of habeas corpus (dkt. no. 21), motion for appointment of counsel (dkt. no. 22),  
3 motion to strike (dkt. no. 28), motion to proceed (dkt. no. 29), and motion for  
4 appointment of counsel (dkt. no. 31) are denied.

5 It is further ordered that petitioner's motion showing cause (dkt. no. 18) is denied.  
6 This action is dismissed with prejudice as untimely. The Clerk of the Court shall enter  
7 judgment accordingly and close this action.

8 It is further ordered that a certificate of appealability is denied.

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10 DATED THIS 18<sup>th</sup> day of November 2015.

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13 MIRANDA M. DU  
14 UNITED STATES DISTRICT JUDGE  
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